UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DFWS, INC., dba THE GUILD SAN JOSE,

Employer,

and Case 32-RC-248845

UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL 5

Petitioner.

EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S CERTIFICATION OF REPRESENTATIVE

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Employer's Request for Review of Regional Director's Certification of Representative

Pursuant to Sections 102.67(c) and (d)(1)-(3) of the Board's Rules and Regulations ("R&R), Employer DFWS, Inc., doing business as The Guild of San Jose ("The Guild" or "the Company") submits its Request for Review to the Board concerning the Certification of Representative ("Certification") belatedly issued by the Regional Director of Region 20 on March 31, 2020, two months after issuance of a Revised Tally of Ballots on January 31, 2020, in which Petitioner United Food & Commercial Workers Union, Local 5 (the "Union") was certified as the exclusive collective bargaining representative of certain Company employees in a unilaterally a revised unit.

The Regional Director's Certification warrants review for the same reasons set forth in the Company's presently-pending Request for Review filed with the Board on January 30, 2020, challenging the Regional Director's Decision Affirming the Hearing Officer's Findings and Recommendations and Order to Open and Count Determinative Challenged Ballots ("Decision") issued on January 16, 2020, which underlies the recently-issued Certification. Indeed, because the Regional Director proceeded to count challenged ballots and certify the results before the Board could rule on The Guild's still-pending Request for Review, this subsequent Request for Review has become necessary to challenge the Certification, protect the Company's rights and preserve the scarce resources of both the Board and the parties. Simply put, the premature Certification issued by the Regional Director of Region 20 was utterly contrary to the positions of a majority of the Board, the Board's new rules for representation elections, and the NLRB Casehandling Manual for representation proceedings. Additionally, the Regional Director's equally premature rush to open and count the Challenged Ballots on January 31, 2020, the very next day after the Company filed its original Request for Review, improperly resulted in the commingling of the Challenged

Ballots with the valid votes counted on October 18, 2020, and created an irretrievable taint that destroyed the laboratory conditions necessary for a valid election which now requires that it be set aside and a new election be conducted.

I. Rule Supporting Request for Review

The Guild requests review pursuant to Sections 102.67(c)(1)-(3) of the Board's Rules and Regulations.

First, the Regional Director's Certification, along with the underlying Decision to count the Challenged Ballots and overrule The Guild's election objections, present a substantial question of policy or law, with a departure from authority or a lack of clarity on current standards. *See* R&R § 102.67(d)(1). The Regional Director pressed ahead, counting challenged ballots and certifying the Union, despite The Guild's pending Request for Review. The Regional Director improperly did so, contrary to authority from a majority of the Board, the Board's new election rules, and the NLRB's Casehandling Manual.

Second, for the same reasons set forth in The Guild's pending Request for Review challenging the Regional Director's Decision underlying her subsequent Certification, the Certification was based on factual determinations that were clearly erroneous on the record and prejudicially affected the Company's rights. *See* R&R § 102.67(d)(2). Indeed, the underlying Decision made factual determinations that improperly rejected The Guild's ballot challenges and election objections, errors compounded by the later Certification stemming from that Decision.

Third, the Regional Director not only acted prematurely in rushing to count the Challenged Ballots with the Request for Review pending before the Board, but her improvident decision also resulted in the improper commingling of the Challenged Ballots with the valid votes cast on October 18, 2020. The Regional Director's glaring error was clearly prejudicial, irretrievably

tainted the process and is a further salient reason requiring that the entire election now be set aside, as her ill-considered action has made identifying which challenged voter cast which challenged ballot impossible after the Board makes its final determination of those issues. *See* R&R § 102.67(d)(1) and (3).

II. Statement of the Case

These proceedings involve a RC Petition filed in Region 32 (within which The Guild is located) on September 25, 2019, and subsequent representation election conducted pursuant to a Stipulated Election Agreement in San Jose, California on October 18, 2019. The original Tally of Ballots was 7 for the Union and 4 against, with 6 challenged ballots – a determinative number.

1. The Guild's First Request for Review Concerning Challenged Ballots and Election Objections.

The parties' Stipulated Election Agreement, reached between them through their counsel and approved by the Regional Director of Region 32 on October 2, 2019, included an agreed-upon unit description. It identified the eligible voters by category or their job classifications. Yet, despite the parties' solemn stipulation that the unit definition include the position of Assistant Store Manager, in her Decision issued on January 16, 2020, the later-assigned Regional Director of Region 20 erroneously sustained the Union's challenge to the ballot of the employee in that job classification, and rejected his ballot. In so doing, the Regional Director improperly revised the parties' stipulated unit definition to entirely exclude the Assistant Store Manager position.

Additionally, the Decision of the Regional Director of Region 20 improperly overruled The Guild's challenges to the ballots of three Floor Managers, despite their clear ineligibility to vote as "supervisors" under Section 2(11) of the National Labor Relations Act. (The parties had stipulated that the individual Floor Managers could vote, subject to challenge concerning their eligibility.) Finally, in her Decision, the Regional Director erroneously rejected The Guild's

several objections to clear improprieties surrounding the election and the manner in which the Board Agent conducted it.

On November 18 and 19, 2020, in San Francisco, a Hearing Officer from Region 20 conducted a hearing on the parties' respective ballot challenges and The Guild's election objections. Before the hearing, the Board transferred the case from Region 32 to Region 20 for the hearing and for further action by the Regional Director there. On December 12, 2019, the Hearing Officer issued his Report and Recommendations on Challenges and Objections. The Guild filed its Exceptions and a Supporting Brief with the Regional Director in Region 20 on December 26, 2019.

On January 16, 2020, the Regional Director issued her Decision. It affirmed the Hearing Officer's findings and recommendations in their entirety regarding the remaining determinative Challenged Ballots, eliminated the Assistant Store Manager job classification from the unit, completely overruled the Company's Objections, and also issued an Order to open and count the remaining 5 Challenged Ballots "consistent with the forthcoming Notice of Ballot Count." *See* RD Decision 1/16/2020 at 2.

In her Decision, the Regional Director redefined the collective bargaining unit, without the Assistant Store Manager, as follows:

> All full-time and regular part-time Front Desk, Inventory, Cultivation, Processing, Budtender, Distribution Manager, and Floor Manager employees; excluding the Operations Manager, Marketing Director, Store Manager, Assistant Store Manager, Confidential employees, Office Clerical employees, Guards, and Supervisors as defined in the National Labor Relations Act.

Id. at 3. The Regional Director then went on to state that, after the counting of the challenged ballots, "Thereafter, I shall issue the appropriate Certification" for the unit as redefined. *Id.*

The Guild timely challenged the Regional Director's erroneous Decision. On January 30, 2020, within the 14 days allowed under Section 102.67(c), the Company filed with the Board its Request for Review of Regional Director's Decision Affirming the Hearing Officer's Findings and Recommendations and Order to Open and Count Determinative Challenged Ballots. *See* Exh. A. That Request for Review remains pending before the Board.

2. The Regional Director's Subsequent Counting of the Challenged Ballots And Certification Two Months Later.

On January 31, 2020, immediately after The Guild filed its Request for Review of her erroneous Decision regarding the determinative challenged ballots and its election objections, the Regional Director opened and counted the 5 Challenged Ballots pursuant to her previous order. The Company's representatives were not present for the opening and counting of the ballots as they did not believe the Regional Director would proceed with the process following the filing of the Company's Request for Review of her Decision issued on January 16, 2020, of which both the Union and the Region were aware. *See* Carrol Decl. ¶¶ 2-5, 7.[1]

In particular, on the morning of January 31, 2020, an attorney from Region 20 called The Guild's counsel to inquire whether a representative of the Company would attend the opening and counting of the ballots. The Guild's counsel informed her of the Company's Request for Review, advising that the opening and counting of the Challenged Ballots should not proceed until the Board made its final determination on the issues raised in the Company's Request for Review filed the previous day, January 30, 2020. As a result of the call, The Guild's attorney came away with the impression that the Region would not proceed with opening and counting the Challenged Ballots at that time. *See id.* at ¶¶ 4-5.

[1] The supporting declaration of Robert K. Carrol is attached as Exhibit B.

Nonetheless, following the call, the Regional Director proceeded to open and count the 5 overruled Challenged Ballots. *See id.* at ¶¶ 5, 7 . The Regional Director's Revised Tally of Ballots added 3 votes in for the Union and 2 votes against the Union to the totals in the Original Tally, making the revised totals 10-6 in favor of the Union. (The four votes that the Employer still vigorously disputes – the three Floor Managers, and the uncounted ballot of the Assistant Store Manager – remain dispositive of the outcome.)

No further activity followed for two months, with The Guild's Request for Review still pending before the Board. On March 31, 2020, 60 days after the Regional Director's revised tally, the Regional Director of Region 20 issued the Certification of the Union as the collective bargaining representative for the unit, as she had previously redefined it. *See* Carrol Decl. ¶ 7.

Following the Certification, on April 3, 2020, by letter received on that date and addressed directly to the Company, the Union's counsel demanded both information and an immediate start in bargaining for a collective bargaining agreement. *See* Carrol Decl. ¶ 8, Exh. 1. Because of the Certification, based on a Decision that remains the subject of a still-pending Request for Review, as well as further errors committed by the Regional Director in rushing as she did to open and count the Challenged Ballots on January 31, 2020, the Company has had to file this further Request for Review.[2]

[2] Through motions filed separately from this Request for Review, The Guild requested a stay of the Certification (along with any and all obligations that may follow from it) and that the Board consolidate its now-two pending Requests for Review and consider them together.

III. Argument

A. The Certification Must Be Rejected for the Same Reasons as the Regional Director's Underlying Decision That is the Subject of The Guild's First Pending Request for Review.

The Regional Director's Certification is erroneous, and must be rejected, for the same reasons that her underlying Decision was wrong with respect to Challenged Ballots and the Company's Election Objections. Those issues are the subject of The Guild's currently-pending Request for Review, filed with the Board on January 30, 2020. To that extent, the Certification and this Request for Review overlap with that first Request for Review. Because the Regional Director's underlying Decision concerning the Challenged Ballots and rejecting the Company's Election Objections was clearly erroneous, the resulting Certification arising from it necessarily is equally erroneous and, accordingly, must be rejected as fruit of the poisonous tree. *Cf. Opryland Hotel*, 323 NLRB 723, 728 (1997).

The Guild thus incorporates its first (and still pending) Request for Review here as if set forth fully herein, with a copy of that Request for Review attached hereto as Exhibit A. Accordingly, for the same reasons fully addressed in that Request for Review, the Regional Director's Certification should be rejected as well.

B. The Regional Director Erroneously Proceeded to Count the Challenged Ballots and Issue a Certification Despite The Guild's Pending Request for Review Before the Board.

The Regional Director further erroneously certified the Union by prematurely doing so, despite the fact that the Company had filed a Request for Review with the Board that was pending at the time. As discussed, the Board filed its Request for Review concerning the Regional Director's underlying Decision on January 30, 2020. The Region was aware of the Request for Review, at least insofar as a Region 20 attorney called The Guild's counsel on the morning of

January 31, 2020, before any opening and counting of Challenged Ballots, was informed of the pending Request for Review, and asked not to proceed with the opening and counting under the Board acted on the pending Request for Review. *See* Carrol Decl. ¶¶ 3-5. Still, as discussed, the Regional Director rushed to proceed to open and count the Challenged Ballots that day and, a few days later on February 4, 2020, issued a Revised Tally of Ballots that included the 5 Challenged Ballots that she ordered counted in her Decision on January 16, 2020.

The Regional Director obviously acted prematurely, and contrary to authority, in both rushing to count the Challenged Ballots on January 31, 2020 and, 60 days later, issuing the Certification despite the still-pending Request for Review of her underlying Decision.

A majority of the current Board has recently criticized the practice of Regional Directors certifying a union as a bargaining representative before the Board could make a final determination on contested issues, or even before issues could be presented to the Board. *Didlake, Inc.*, 367 NLRB No. 125, 2019 WL 2099781 (May 10, 2019), at *1 n. 2 (Ring and Kaplan, concurring). "In other words, the union may be certified, and the duty to bargain may attach, before the Board has made a final determination affecting the outcome of the election." *Id.* The majority further observed that the Board's 2014 Election Rule "greatly increased the number of requests for review pending before the Board after the regional director's issuance of a certification . . . ." *Id.* It concluded that "this state of affairs warrants reconsideration in a future rulemaking." *Id.* Another previous Board Chairman did so recently as well. *See Republic Silver State Disposal, Inc.*, 365 NLRB No. 145, 2017 WL 5476777 (Oct. 30, 2017), at *1 n. 1 (Miscimarra, dissenting); *PCC Structurals, Inc.*, 2017 WL 4232984 (Sept. 22, 2017), at *1 n. 1 (Miscimarra, dissenting).

Even with the Board's 2014 Election Rule, the NLRB Casehandling Manual still prescribed against opening and counting Overruled Challenged Ballots with a related Request for Review still

pending. It has, and still, provides: "To help protect voter secrecy, the region should not open and count until the time for filing a request for review has passed and no request was filed or the Board has ruled on the request for review." NLRB Casehandling Manual (Part Two), Section 11378 (Jan. 2017)(emphasis added). Here, by counting the Challenged Ballots and issuing the Certification notwithstanding the Company's pending Request for Review on the same matters, the Regional Director thus acted contrary to this guidance. The Board has held that not handling Challenged Ballots in accordance with the Manual's instructions has required setting aside an election, even with no evidence of tampering. *Paprikas Fono*, 273 NLRB 1326, 1326-1329 (1984).

More recently, the Board changed its representation election rules to address the exact situation presented here: Premature certification of the Union as bargaining representative while a Request for Review remaining pending before the Board. *See* 84 Fed. Reg. 69524 (Dec. 18, 2019). The Board modified Section 102.69(c)(1)(iii) to preclude such certifications. *See id.* at 69526. It summarized that the amendments will require that "[t]he Regional Director will no longer certify the results of an election if a request for review is pending . . . ." *Id.* at 69526. Further, as the Board members addressed, the previous rule meant that "a certified union would often demand bargaining and file unfair labor practice charges alleging an unlawful refusal to bargain even as the Board considered a request for review that, if granted, could render the certification a nullity." *Id*.[3]

[3] The Regional Director's timing was curious. Despite hurrying to open and count the Challenged Ballots, the Regional Director waited 60 days between January 31, 2020 and March 31, 2020 before issuing the Certification. The Regional Director may have sought to avoid the Board's amended rules. With 14 days for The Guild to file a Request for Review, the Regional Director's Certification on March 31, 2020 gave the Company until April 14, 2020 – just before the original April 16, 2020 effective date for the Board's amended rules.

Accordingly, because the Regional Director acted improperly and prematurely in issuing the counting the Challenged Ballots and issuing the Certification before the Board could resolve the pending Request for Review concerning those Challenged Ballots and the Company's Election Objections, the Certification must be rejected and reversed.[4]

C. The Regional Director's Premature Opening and Counting of the Challenged Ballots Resulted in Commingling Them, Irretrievably Tainting The Process and Further Requiring Setting Aside the Election.

In prematurely opening and counting the Challenged Ballots, the Regional Director commingled the ballots. This action irretrievably tainted the election process further to the prejudice of the parties. As a result, upon final determination on the issues concerning the Challenged Ballots, it now would be impossible to match the Challenged Ballots with their respective challenged voters so that the correct votes are counted or excluded. This situation further demonstrates why the Certification should have waited for the Board's final determination on The Guild's Request for Review – as the Board's new election rules would require. Unfortunately, here, the Regional Director's premature commingling further requires setting aside the election.

[4] In a side issue and commentary accompanying the Certification, the Regional Director improperly expounded on how she believes The Guild's first Request for Review was "untimely in my view." Certification at 1 n. 1. As the Regional Director noted, The Guild timely e-filed the Request for Review on January 30, 2020, but also encountered filing difficulties. *See id.* But, in any event, her contentions are misplaced and wrong. Importantly, the Board accepted The Guild's filing and treated it as having been timely filed on January 30, 2020, according to the Board's docket. *See* https://www.nlrb.gov/case/32-RC-248845 (visited on April 10, 2020). The timing of filings with the Board, and whether to accept them, obviously is a matter for the Board to determine and not a Regional Director. The Union also raised no argument on this issue in its February 6, 2020 Opposition to The Guild's Request for Review, thus waiving any such contention. Finally, the Regional Director's further discussion of her views on when a party should be able to file a Request for Review (perhaps creating "an impossible Humpty Dumpty scenario") is nothing but an improper and misplaced policy commentary that apparently just disagrees with the Board's new election rules. Certification at 1 n. 1. It should be disregarded.

As a basic matter, the Board requires secret ballot elections. Ballots thus get commingled before counting. Challenged Ballots also get commingled, with such ballot envelopes opened and the ballots dropped separately. "After the ballots thus taken from the challenged ballots are thoroughly mixed with each other, they should be unfolded and counted." NLRB Casehandling Manual (Part Two), Section 11378 (Jan. 2017). However, Challenged Ballots should be commingled and opened only when unnecessary to determine then or later which voter cast a particular ballot. *Garrity Oil Co.*, 272 NLRB 158 (1984)(waiver of ballot secrecy). Otherwise, when Challenged Ballots have been determinative of the possible outcome, the Board has held that an election had to be set aside when Challenged Ballots were determinative, but commingling made it impossible to match particular Challenged Ballots with their respective challenged voters. *J.C.L. Zigor Corp.*, 274 NLRB 1477 (1985).

Here, the Challenged Ballots are of a sufficient number to be determinative. As discussed, originally, the tally was 7 votes in favor of the Union and 4 opposed, with 6 Challenged Ballots. With 5 Challenged Ballots counted, the revised tally was 10 in favor and 6 against. There still is one Challenged Ballot uncounted – the vote from the Assistant Store Manager. Importantly, this case is **not** a situation where The Guild would have to receive the vote through every Challenged Ballot, or exclude every Challenged Ballot, in order for the result to change. As the record at the hearing, and the Hearing Officer's decision made clear, the determination of whether each Challenged Voter could vote was an individual issue. Thus, depending on the outcome of The Guild's Request for Review, some or all of the Company's election challenges might be sustained, while the Assistant Store Manager ultimately should be included in the unit (as the parties agreed) and have his vote counted.

However, as discussed, because the Regional Director prematurely opened and commingled the Challenged Ballots, any particular ballots that should be excluded now cannot be identified. There is no way to correct that error now. Because of that impossibility, the Challenged Ballots have been irretrievably tainted, with irrevocable prejudice. Accordingly, as a result, the election must be set aside for this further reason as well, with a new election required.

IV. Conclusion

For all of the these reasons, The Guild respectfully requests that the Board grant review in this case and vacate or reverse the Regional Director's Certification or, alternatively, remand the matter to Region 20 for a hearing on any remaining or unresolved issues concerning the Certification, including the opening and counting of the Challenged Ballots.

Dated: April 10, 2020

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By _____
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EXHIBIT A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DFWS, INC. dba THE GUILD SAN JOSE,

Employer,

and Case 32-RC-248845

UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL 5

Petitioner.

REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AFFIRMING THE HEARING OFFICER'S FINDINGS AND RECOMMENDATIONS AND ORDER TO OPEN AND COUNT DETERMINATIVE CHALLENGED BALLOTS

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Request for Review of Regional Director's
Decision Affirming the Hearing Officer's Findings and Recommendations
And Order to Open and Count Determinative Challenged Ballots

Pursuant to Sections 102.67(c)(2) of the Board's Rules and Regulations, DFWS, Inc. dba The Guild San Jose ("The Guild" or the "Company") hereby submits its Request for Review to the Board in support of reversing the Regional Director's recent Decision to sustain the challenge by Petitioner, UFCW Local 5 ("Union" or "Petitioner") to the ballot of **stipulated** "Assistant Store Manager", Jordan Jimenez,[1] and overrule the challenges to the ballots of "Floor Managers" Richard Takahata, Jose Palacios, and Nicole Gonzales, despite their **obvious** status as "supervisors" pursuant to Section 2(11) of the National Labor Relations Act ("NLRA" or "Act"), or, alternatively, should it be necessary once these issues are resolved, reversing her decision to overrule the Company's well-taken Objections to the propriety of the representation election conducted on its premises in San Jose, California, on October 18, 2019.[2]

For each and all of the reasons set forth below, the Company respectfully submits that the Board should find and conclude that, in rubber-stamping the **clearly-erroneous** recommendations of the Hearing Officer, the Regional Director: (i) improperly **eviscerated** the parties' clear, voluntary, explicit and solemn **stipulation** establishing that Assistant Store Manager Jimenez is **eligible** to vote; and (ii) that, despite the entirety of the present record and great weight of the testimony and secondary indicia, failing to find that the Floor Managers, Richard Takahata, Jose

[1] The Union withdrew its challenge to Jarid Drake as an eligible voter, and thus, the Company does not address why he is properly a part of the voting unit. Additionally, both the Hearing Officer and Regional Director overruled the Unions challenge to the vote of Joanne Mendoza, and accordingly, the Company submits that Mr. Drake and Ms. Mendoza's ballots should be opened and counted along with the ballot of Mr. Jimenez.

[2] It should be noted by the Board that the Company's Request for Review does not directly address the Regional Director's erroneous decision to adopt the Hearing Officer's recommendation and overrule the Company's Objections 1-3 to the conduct of the election. However, should there be a final election result contrary to the Company's interest, the Company respectfully requests that its Objections 1-3 and supporting arguments advanced in its Post Hearing Brief to the Hearing Officer be incorporated into the present Request for Review as if set forth fully herein and be considered by the Board at that time as compelling reasons to overturn the election result and order the conduct of a new election.

Palacios, and Nicole Gonzales, are supervisors pursuant to Section 2(11) of the Act and, accordingly, **ineligible** voters in the present election. Indeed, in an obvious rush to certify the Union, the Regional Director clearly misapplied applicable Board precedent and erroneously chose to ignore both the facts that the Hearing Officer (i) failed to enforce the crystal clear language of the parties' binding and controlling Stipulated Election Agreement regarding Assistant Store Manager Jimenez, and (ii) did not properly consider the demeanor and biases of the witnesses when reviewing the conflicting testimony regarding the clear supervisory status of Floor Managers Richard Takahata, Jose Palacios, and Nicole Gonzales. Although the Regional Director has cited the relevant case law in her Decision, she grossly misapplied it by **failing or refusing** to individually review all of the testimony, secondary indicia, and **stipulations** of the parties before reaching any determination as to whether the "clear preponderance" of the present record demonstrated that the Hearing Officer's recommendations were incorrect.

For each and all of the above and foregoing reasons, the Company respectfully urges the Board to grant review of this case, and, based upon the **entirety** of the record evidence and appropriate application of the relevant law, find and conclude that: (i) Assistant Store Manager Jimenez **is** clearly an eligible voter, based upon the clear and explicit language of the parties' voluntary, binding Stipulation Election Agreement, whose ballot should be opened, counted, and included in the Final Tally of Ballots; and (ii) the Floor Managers Takahata, Palacios, and Gonzales are clearly "supervisors" within the meaning of Section 2(11) of the NLRA whose ballots should **not** be counted.

I. Statement of the Case

On October 2, 2019, the Regional Director of Region 32 approved a Stipulated Election Agreement voluntarily entered into by the parties, through their respective counsel, regarding the

terms and conditions of the election, including specifically the eligible voters in the election to be held on October 18, 2019. In particular, the Stipulated Election Agreement, sets forth that the "Assistant Store Manager," here, Jordan Jimenez, **is an eligible voter** and that the Company's "Floor Managers," concerning whose eligibility the parties could not then stipulate, may "vote in the election, but their ballots will be challenged since their eligibility has not been resolved." Thereafter, on October 18, 2019, an agent of Region 32 conducted an election among the members of the voting unit **stipulated** to by the parties in the Stipulated Election Agreement at the Company's dispensary located in San Jose, California, following which, the official Tally of Ballots reflected that seven (7) ballots were cast for the Petitioner; four (4) ballots were cast against the Petitioner and six (6) ballots were challenged that were determinative of the outcome. Although the Company believed that the ballots were tallied correctly, it refused to sign the official Tally of Ballots because of glaring improprieties in the Board Agent's conduct of the election and by the Union's agents and its own supervisors both during the critical pre-election period and during the election itself to which the Company filed formal Objections on October 25, 2019.

Thereafter, due to the allegations of impropriety by the Board Agent from Region 32 in charge of the election, the case was formally transferred by the Board to Region 20 and, on November 18-19, 2019, a hearing was held by Hearing Officer, Richard McPalmer ("Hearing Officer"), at Region 20 in San Francisco regarding the six (6) Challenged Ballots and the Company's Objections. On December 12, 2019, the Hearing Officer issued his "Report and Recommendations on Challenges and Objections" in which, among other erroneous recommendations, he sustained the Union's challenge to the vote of **stipulated** "Assistant Store Manager," Jordan Jimenez, found that the three "Floor Managers" who voted via **stipulated** Challenged Ballots in the election, Takahata, Palacios and Gonzales were somehow not ineligible

"supervisors" as defined by Section 2(11) of the Act and recommended that the Company's Objections to the election be overruled. In alleged support of his recommendations, the Hearing Officer ignored the parties' clear and solemn **stipulation** regarding the eligibility of Assistant Store Manager Jimenez and inexplicably disregarded the credible testimony of the Company's President, Dana Anderson, and instead chose to rely on the clearly-biased testimony of self-admitted Union adherents, Floor Managers Takahata and Palacios, in finding that they were eligible voters in the election.

Thereafter, on December 26, 2019, the Company filed Exceptions and a Supporting Brief with the Regional Director of Region 20 to the Hearing Officer's Report and Recommendations on Challenges and Objections, which clearly and overwhelmingly demonstrated that the Hearing Officer's recommendations regarding the Challenged Ballots of Assistant Store Manager Jimenez and Floor Managers Takahata, Palacios and Gonzales should not be adopted and that the ballot of Assistant Store Manager Jimenez should be opened and counted and that those of the Floor Managers should not be counted and included in the Final Tally of Ballots. However, rather than ignoring the Hearing Officer's ill-considered recommendations, on January 16, 2019, the Regional Director essentially chose to rubber stamp his recommendations regarding both the challenges to the ballots of Assistant Store Manager Jimenez and the Floor Managers and, if necessary, the Company's well-taken Objections to the election. In so doing, as is more fully explicated below, the Regional Director erroneously stated that the evidence somehow fell short of meeting the "clear preponderance" standard for reversing credibility findings of a Hearing Officer and provided utterly **no** reasoning for her decision in this regard, including whether she even reviewed the clear record evidence concerning the demeanor of the witnesses, their statements against interest and in light of the record of evidence in this matter.

I. Argument

A. The Stipulated Election Agreement Is Controlling And, Thus, Mandates That As An Assistant Store Manager Jordan Jimenez Was Specifically Included In The Voting Unit And Thus Eligible To Vote.

The parties' Stipulated Election Agreement listed "[a]ll regular full-time and regular part-time Budtenders/Counter-Sales, Lead Budtenders/ **Assistant-Managers**, Reception/ID-Checkers, and Processing/Cultivation Employees" as eligible members of the voting unit. (Emphasis added.) The parties' clear, voluntary, and thus, legally-binding **stipulated agreement** that Mr. Jimenez's position as Assistant Store Manager is part of the eligible voting unit, necessarily must control. Indeed, the Regional Director incorrectly accepted the Hearing Officer's conclusion in disregard without "further discussion" and **patently failed** to consider the most crucial piece of evidence—the parties' voluntary and explicit **stipulation** that, as an "Assistant Store Manager" employee Jordan Jimenez was/is unequivocally an agreed-upon member of the voting unit and, accordingly, an eligible voter in the election. It is a fundamental legal principle that parties may voluntarily contract about anything. The Regional Director's conclusion that "[b]oard law is clear on this point", even if correct, has utterly **no impact** here because the parties' explicit agreement controls.

Furthermore, Board law actually supports a finding that the stipulation controls here. It is a well-established principle of Board law that: "once a union and a company stipulate to the appropriateness of a bargaining unit in a consent-election agreement, that stipulation demands great respect from the NLRB." *See, e.g., NLRB v. J.J. Collins' Sons, Inc.*, 332 F.2d 523, 525 (7th Cir.1964). In such a case, the NLRB is not making an 'independent determination of a proper bargaining unit'; it is 'construing a contract.' *NLRB v. Joclin Mfg. Co.*, 314 F.2d 627, 633 (2d Cir.1963) (Friendly, J.)." *N.L.R.B. v. Lake County Ass'n for Retarded, Inc.* (7th Cir. 1997) 128

F.3d 1181, 1185. The terms of the agreement are clear here: Assistant Store Managers like Mr. Jimenez were **explicitly included** by the parties within the voting unit. Where, as here, the partiers agreement is clear, the Hearing Officer and Regional Director are strictly limited when construing the terms of the parties' agreement. However, here, the Hearing Officer exceeded his authority by making an independent determination of whether Assistant Store Manager Jimenez was properly a part of the voting unit and, thus, the Regional Director's decision to accept that obviously incorrect determination should respectfully be reversed by this Board and be opened and counted.

B. The Regional Director Erred In Failing To Find That The Floor Managers Are Supervisors Pursuant To Section 2(11) of the NLRA Because They Have Crystal Clear Authority To Engage In Several Supervisory Functions And Thus The Challenges To Their Votes Should Be Sustained.

The Regional Director clearly erred in adopting the Hearing Officers recommendations that Floor Managers Takahata, Palacios, and Gonzales are not statutory supervisors under Section 2(11) of the NLRA. It is well-settled Board law that "[e]mployees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" *N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001) (citing *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 579 (1994)). "[A]ctual existence of supervisory authority rather than its exercise is determinative." *N.L.R.B. v. Gray Line Tours, Inc.*, 461 F.2d 763, 764 (9th Cir. 1972). Simply put, the Regional Director committed clear error in adopting the Hearing Officers incorrect conclusion that the Floor Managers did not "have authority to assign, responsibly direct, or discipline unit employees." Report and Recommendations on Objections ("RRO") p. 11. Quite to the contrary, the law is

crystal clear on this point, namely, that the authority to perform any one of these supervisory duties is **independently sufficient** to establish supervisor status under the NLRA. *Kentucky River Cmty. Care, Inc.*, 532 U.S. at 713.

a. Floor Managers have the authority to and, in fact did, discipline employees.

At the hearing, the Company's President Dana Anderson, who is the person most knowledgeable about the roles and responsibilities of her employees, testified clearly, consistently and credibly regarding the role of the Floor Managers. Anderson testified **repeatedly,** and with the utmost authority on the subject, that her Floor Managers were given the authority to discipline the Budtenders and front desk employees from the beginning of her employment with The Guild in September 2018. Hearing Transcript, p. 67:22-23; 85:3-18; 86:15-17; 87:23-25 – 88:1-5; 104:15-24; 125:24-25 – 126:1-5. Furthermore, Ms. Anderson testified, that when a situation arises where discipline may be necessary, her expectation as President is that the "[F]loor [M]anager . . . make the decision on how they're going to handle the situation." Hearing Transcript, p. 85:17-18. She also credibly testified that, when a Floor Manager issues written discipline to an employee, they may do so on their own without approval from The Company's upper management. Hearing Transcript, p. 104:15-24. Based upon her Testimony in this regard, the Floor Managers clearly possess the authority to exercise their independent judgment in determining when discipline is warranted and are free to discipline employees under their supervision without approval from upper management.

On the other hand, the testimony of Floor Managers, Takahata and Palacios, that they did not write up other employees, was clearly-biased, untrustworthy and blatantly contradicted by neutral fact witnesses. RRO p. 15. Indeed, such an inference is logically implausible, legally insufficient, and should not have been adopted by the Regional Director. In reality, whether Messrs. Palacios and Takahata chose to actually exercise their authority to discipline employees

is **not** determinative of the inquiry because the "actual **existence** of supervisory authority rather than its exercise is determinative." *Gray Line Tours, Inc.*, 461 F.2d at 764 (emphasis added). At most, Messrs. Palacios and Takahata's insubordinate refusal to carry out this important aspect of their delegated authority demonstrates their poor performance as supervisors, but **not** that they did not possess the authority to exercise independent judgment as set forth in Section 2(11) NLRA.

In fact, the record definitively establishes, that at least one Floor Manager, Ms. Gonzales, issued disciplinary written warnings. Yesenia Contreras, one of the Company's front desk receptionists and a neutral fact witness, testified that Ms. Gonzales wrote her up for failing to notify a Floor Manager that she was going to be late. Ms. Contreras knew that Ms. Gonzales was responsible for issuing the write up because it was Ms. Gonzales's signature and handwriting on the notice. Hearing Transcript, p. 227:11-13. Moreover, the Regional Director erred in failing to reverse the Hearing Officers conclusion that the fact that Bennett Schatz (Store Manager) was the person who physically handed the written warning to Ms. Contreras somehow "suggests a more limited role for the Floor Managers." RRO p. 15. Indeed, Mr. Schatz's role here was purely to serve as a messenger—he may have handed Ms. Contreras the written disciplinary form, but the decision to issue the discipline came from Ms. Gonzales in her role as a supervisor. Accordingly, for this reason alone, the Regional Director erred in finding that Floor Managers are supervisor within the meaning of Section 2(11) of NRLA and therefore ineligible voters.

b. Floor Managers have the authority to assign work to the employees whom they supervise.

Ms. Anderson also testified clearly, consistently, and truthfully that she delegated the authority to "assign people to do particular jobs," "offer lunch breaks and schedule changes,"

"cover shift spots, [] transition a budtender from the sales floor to the front reception" and tell Budtenders and receptionists "where to go and what to do" to her Floor Managers. Hearing Transcript, p. 71:21-22; 73:14-15; 92:2-4; 154:10-13. Moreover, Assistant Inventory Manager, a natural fact witness, Jarid Drake, also corroborated Ms. Anderson's testimony in this regard, that when he needs help, he has to ask a Floor Manager to send a Budtender to help him. Hearing Transcript, p. 183: 8-9.

The Regional Director also committed clear error by failing to reverse the Hearing Officer inexplicably dismissed the credible testimony of Ms. Anderson and, instead, choosing to rely on the testimony of the very individuals who stood to gain from being designated as non-supervisors—the Floor Managers themselves. And in this regard, the incredible testimony of Messrs. Palacios and Takahata's testimony that they somehow "relied on volunteers" to accomplish tasks is facetious, at best, and manifestly **not** illustrative of the actual authority delegated to them by Ms. Anderson. Rather, as Ms. Anderson testified, her expectation, delegated to the Floor Managers was that they "offer break time, cover shift spots, and transition a budtender from the sales floor to the front reception" if necessary, all **without** seeking approval from her or anyone else in upper management. Hearing Transcript, p. 92:2-14. That Mr. Palacios and Mr. Takahata allegedly **chose** to rely on "volunteers" instead of exercising their delegated authority is at most a managerial style choice, but **not** a limitation on the supervisory authority delegated to them by the Company.

Furthermore, Ms. Anderson testified credibly and truthfully that her Floor Managers also had the authority to grant overtime to both the Budtenders and receptionists who they supervised, without approval from anyone in upper management. Hearing Transcript, p. 115:19-25 – 116:1-22. Mr. Palacios's incredulous testimony that he "needed approval" from upper management to

grant overtime to Budtenders is not only unreliable due to his blatant bias but again establishes that his managerial style is nothing more than his preference for how to carry out his supervisory duties. Hearing Transcript, p. 341:5-25 – 342:1-10. Indeed, Mr. Palacios did **not** testify that either Ms. Anderson, or anyone in upper management at the Company, told him he needed approval in order to grant overtime or that he could be disciplined if he did not first seek approval for overtime. As with his refusal to carry out his supervisory duty of disciplining other employees, Mr. Palacios's testimony established nothing more than his unwillingness to perform his duties as expected. Accordingly, it was clearly erroneous for the Regional Director to fail to ignore the Hearing Officer's recommendation that Floor Managers Takahata, Palacios, and Gonzales were somehow not supervisors according to Section 2(11) of the NRLA based solely on the bias testimony of two self-admitted Union adherents.

c. Secondary Indicia Demonstrates Unequivocally that the Floor Managers Are Statutory Supervisors.

Although the above review of Ms. Anderson's testimony clearly demonstrates that the Floor Managers were statutory supervisors pursuant to Section 2(11), the Board is also encouraged to consider the following secondary indicia of supervisory status, ignored by the Regional Director. *National Labor Relations Board v. Missouri Red Quarries, Inc.* (8th Cir. 2017) 853 F.3d 920, 928.

First, "[w]arranted or not, employees perceived [the Floor Managers] to possess some extra degree of supervisory authority." *Id.* at 929. Indeed, Mr. Drake credibly testified that he understood that the Floor Managers were his "**supervisors**." Hearing Transcript, p. 164:17-22. And, Ms. Contreras, another neutral witness, clearly corroborated Mr. Drake's testimony in this regard because the Floor Managers could, and did, discipline her for being late to work. Hearing Transcript, p. 225:7-17.

Second, the real-world implications of the Floor Managers' authority also militate in favor of a finding that they are supervisors. In particular, Ms. Anderson testified that there must always be at least one Floor Manager, sometimes up to two, **on site at all times**. Hearing Transcript, 94:15-19. Because the marijuana business is a highly regulated, "all cash business", Ms. Anderson credibly testified that she and the Company rely on its Floor Managers to ensure that the cashbox reconciles at the end of each shift. Hearing Transcript, pp. 44:2-3; 124:8-18; 125:1-21. It is crystal clear, therefore, that, if the Floor Managers were not supervisors, the Company would be leaving the retail floor of a highly regulated all cash business without a management representative to oversee critical financial transactions and it is completely unreasonable to conclude otherwise. *See Missouri Red Quarries, Inc.*, 853 F.3d at 928 ("That is, if Johnston was not a supervisor, then the quarry was left without an on-site supervisor for many weeks at a time. It is not 'a reasonable conclusion' to think Missouri Red would run its quarry—which is spread across 400 acres and operates around the clock—'without on-site supervision.'"). Accordingly, if the Regional Director had properly considered all reasonable inferences and inherent probabilities set forth on the present record, she would have reached the only possible conclusion, namely, that the Floor Managers are supervisors pursuant to section 2(11) of the NRLA. *Northridge Knitting Mills,* 223 NLRB 230, 235 (1976) ("[T]he ultimate choice between conflicting testimony … rests on the weight of the evidence, established or admitted facts, **inherent probabilities, reasonable inferences drawn from the record**, and, in sum, all of the other variant factors which the trier of fact must consider in resolving credibility.")

d. The Regional Director Incorrectly Refused To Evaluate The Totality of the Record Evidence In Blindly Accepting The Hearing Officer's Recommendations.

Finally, the Company respectfully urges the Board to find that the Regional Director made a clear error in accepting the Hearing Officer's recommendation that e Floor Managers Richard Takahata, Jose Palacios, and Nicole Gonzales are somehow not supervisors pursuant to Section 2(11) of the NLRA. Although she correctly cited the case law holding that a Hearing Officer's credibility finding should be reversed when the clear preponderance of the evidence establishes that they are incorrect, she failed to weigh, or even consider, any of the overwhelming evidence posited by the Company. In particular, the Regional Director, failed to consider the clear bias of Floor Managers Takahata and Palacios who were responsible for the entire Union election campaign; the logical, straightforward and credible testimony of Ms. Anderson, the **very** individual who delegated the supervisory authority of the Floor Managers to assign, direct, and control employees in their work, grant overtime, and discipline them, and in the process exercise their own independent judgment; and other numerous facts that directly contravene the Floor Managers' contrived testimony.

In situations where either a Hearing Officer or Administrative Law Judge make erroneous credibility resolution or failed to resolve important testimonial conflicts, the Board itself may independently analyze conflicting testimony to make its own findings on key issues. *Helweg & Farmer Transp. Co., Inc. & Chauffeurs, Teamsters & Helpers*, Local Union No. 492, Affiliated with Int'l Bhd. of Teamsters, Afl-Cio (Feb. 27, 2004) 2004 WL 404417. Here, the testimony of the Company's President, Ms. Anderson, and Assistant Inventory Manager Drake clearly conflicted with the testimony of Floor Managers Takahata and Palacios. Thus, it was clearly erroneous for the Regional Director to fail to find that the Hearing Officer did not properly consider the demeanor of witnesses, the reliability of their testimony, their clear biases, and consistency of testimony between neutral and non-neutral witnesses and basic common sense in

determining which of the conflicting accounts to believe. Indeed, the Regional Director should have found that the Hearing Officer erred in failing to consider all these elements and finding that Ms. Anderson's clearly, consistent and credible testimony made her the most reliable witness regarding the actual authority delegated by her and the Company to the Floor Managers because she was the person with the power to perform that task, and her testimony that the Floor Managers had clear authority to discipline was directly supported by the neutral witness Yesenia Contreras who testified pursuant to subpoena that Floor Manager Gonzales "wrote her up" for failing to notify a Floor Manager she was going to be late. See, e.g., *W.T. Grant*, 214 NLRB 698 (1974) (Board rejected ALJ's credibility resolutions after finding the discredited testimony of an employer witness had been corroborated by witnesses presented by the General Counsel and the Charging Party.)

On the other hand, the testimony of Floor Managers Takahata and Palacios was evasive, illogical, and clearly contrived and did not refute credible testimony from neutral witnesses that directly conflicted with their account. See, e.g. *In Re Sonic Auto.* (Feb. 28, 2003) 2003 WL 935310 ("It seems to me that Scarboro's clear bias renders his testimony suspect. Coupled with its other shortcomings, I am unable to credit him."). In one particularly illustrative example, Takahata and Palacios argued that they weren't supervisors because they didn't delegate tasks they merely asked for volunteers. Anyone who has every managed people at a workplace would find this description laughable. While a boss wishing to curry favor with employees may choose to "ask" employees whether there is a certain task for which they prefer to be responsible for, ultimately, all tasks must be completed, and, if there are no volunteers someone must be assigned to complete the task. The decision, as discussed above, the Floor Managers alleged "decision to ask for volunteers" is merely one possible managerial style, but not the mark of someone without power, and further

demonstrates their delegated authority to not only select who completes these tasks, but to choose their own method for assigning. Here, it is clear that the evidence preponderates in favor of the Company's position that the Floor Managers are supervisors, yet, the Regional Director failed to consider the entirety of the records evidence in this regard.

IV. Conclusion

For all of the these reasons, the Company respectfully requests that the Board grant review in this case and, based upon the entirety of the record evidence and appropriate application of the relevant law, find and conclude that: (i) Assistant Store Manager Jimenez is clearly an eligible voter, whose ballot should be opened, counted, and included in the Final Tally of Ballots; and (ii) the Floor Managers Takahata, Palacios, and Gonzales are clearly "supervisors," within the meaning of Section 2(11) of the NLRA, whose ballots should not be counted.[3]

Dated: January 30, 2020

ARENT FOX, LLP

By: _____

Robert K. Carrol
Counsel for Employer DFWS Inc. dba
The Guild San Jose

[3] Or, as set forth more fully in Footnote 2 on p. 2 of the present Request for Review, the Company respectfully urges the Board to consider each and all of the Objections 1-3 and supporting arguments advanced in its Post Hearing Brief to the Hearing Officer and find and conclude that the Regional Director's decision to adopt the Hearing Officer's recommendations and overrule the Objections is clearly erroneous.

EXHIBIT B

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

DFWS, INC. dba THE GUILD SAN JOSE, Employer, and **UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 5** Petitioner.	Case 32-RC-248845

DECLARATION OF ROBERT K. CARROL

I, Robert K Carrol, voluntarily declare and state as follows:

1. I am a Partner in the San Francisco office of Arent Fox LLP, counsel of record for the Employer, DFWS, Inc., doing business as The Guild San Jose ("The Guild" or "the Company") in this case. I am admitted to practice law in the state courts in California, Washington, and Texas, numerous federal district courts, the United States Courts of Appeal for the District of Columbia and Ninth Circuits, and the Supreme Court of the United States. I have practiced before the National Labor Relations Board for more than four decades. I have represented The Guild since the inception of this case, with the filing of the Representation Petition by Petitioner, UFCW, Local 5 ("Union") on September 25, 2019.

2. In brief summary, the representation election was held pursuant to a Stipulated Election Agreement between the Company and the Union at the Company's facility located in San Jose, California, on October 18, 2019. Among 26 eligible voters, 17 ballots that were cast and counted that day. Of them seven were cast for the Union, four were cast against the Union, and

six challenged ballots were sealed. They were, and still are, determinative of the outcome. Thereafter, on October 21, 2019, the Regional Director sent a letter to the parties summarizing the challenged ballots, asking the Union to explain why it challenged certain employees whom it had stipulated were eligible voters, and setting October 25, 2019 as the date for the filing of any Objections to the election. The Company filed its Objections on October 25, 2019, which included several allegations of serious misconduct by both the Union and the Board Agent, which combined to destroy the laboratory conditions necessary for a valid election. Shortly afterward, because the Board Agent misconduct involved a Field Examiner from Region 32 in Oakland, the Board transferred the case to Region 20 in San Francisco. There, a Field Attorney/Hearing Officer for Region 20 conducted an evidentiary hearing on November 20-21, 2019. On December 11, 2019, the Field Attorney/Hearing Officer from Region 20 issued his Report on Challenges and Objections. The Company filed Exceptions and a Supporting Brief with the Regional Director of Region 20 on December 26, 2019.

3. On January 16, 2020, the Regional Director of Region 20 issued her Decision affirming the Field Attorney/Hearing Officer's recommendations. She also notified the parties that January 30, 2020 was the deadline for filing any Request for Review with the Board. The Regional Director's Decision ordered opening and counting of five of six challenged ballots identified in her Decision, following which she would issue "the appropriate Certification." On January 17, 2020, the Regional Director sent a letter to the parties that a ballot count would be held on January 31, 2020 at 10:00 a.m., the morning after any Request for Review was due to be filed with the Board. Thereafter, on January 30, 2020, the Company filed its Request for Review of the Regional Director's Decision. As of today, that Request for Review remains pending with the Board.

4. Shortly after 10:00 a.m. on January 31, 2020, I received a call on my mobile phone from a woman who identified herself as Yasmine Macanola from Region 20. I later confirmed that she is a Field Attorney with Region 20 in San Francisco. Ms. Macanola asked whether I or someone else representing the Company was "going to attend the ballot count." I responded "What ballot count? We filed a Request for Review of the Regional Director's Decision and, because there are key challenged ballots at issue now before the Board, you'd better not place them in jeopardy." Ms. Macanola seemed surprised by my response. She said, "I don't know anything about that." I responded, "Well, if the Union representative is in the Hearing Room with you, he should have the copy we emailed to his counsel yesterday, so please ask him about that filing or go speak with the RD before you do any opening and counting of challenged ballots, because there is no need to do that now." Ms. Macanola seemed concerned by my cautionary comment, stating that she would "look into it." I then asked her whether she had "either opened or counted the challenged ballots as of yet." Ms. Macanola said that she had not. I responded by saying again that, in light of the Company's filing of the Request for Review, "we would not be sending anyone to the [Region 20] office." I added that I was sure that, "after speaking with the RD, you and she would do the right thing," meaning not risk opening the outcome determinative challenged ballots and hopelessly commingling them with the other valid votes. Doing so would irretrievably compromise the sanctity of the balloting on October 18, 2019, before the Board had had a chance to review the record concerning them as part of the Company's Request for Review. My call with Ms. Macanola lasted approximately five minutes.

5. I heard nothing further from Ms. Macanola about the ballot count. On February 4, 2020, I received a Revised Tally of Ballots from the Regional Director dated January 31, 2020. It reflected that, despite the Company's pending Request for Review of the Regional Director's

Decision of January 16, 2020 regarding the outstanding challenged ballots and Objections, as well as my conversation with Ms. Macanola on January 31, 2020 when she left me with the impression that she would check with the Regional Director and not proceed with the ballot count.

6. Two days later, on February 6, 2020, the Union filed a Response to the Company's Request for Review filed with the Board on January 30, 2020.

7. My office heard nothing further from Region 20 after the Revised Tally of Ballots, apparently issued on January 31, 2020 and received on February 4, 2020. On March 31, 2020, 60 days later, I received by e-mail from Region 20 a copy of the Regional Director's Certification of Representative ("Certification"), certifying the Union as the collective bargaining representative.

8. On April 3, 2020, I received by e-mail from the office of the Union's counsel in this case, a letter dated April 2, 2020, sent directly by Union counsel to Dana Anderson, General Manager, clearly based upon the Regional Director's March 31, 2020 Certification, demanding that the Company immediately engage in collective bargaining with the Union and provide it certain requested information. Attached as Exhibit 1 is a true and correct copy of the April 3, 2020 e-mail that I received from the Union's counsel's law firm, along with a true and correct copy of the Union's counsel's April 2, 2020 letter that was attached to that e-mail.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and, if called to testify, I could and would testify competently to the facts stated in this Declaration.

Executed this ninth day of April 2020 at San Francisco, California.

Robert K. Carrol

EXHIBIT 1

From: Sally Mendez <SMendez@unioncounsel.net>
Sent: Friday, April 3, 2020 12:01 PM
To: dana@receivershipspecialists.com
Cc: Alan Crowley <acrowley@unioncounsel.net>; James Araby (jaraby@ufcw5.org) <jaraby@ufcw5.org>; rmcgilley@ufcw5.org; Carrol, Robert K. <Robert.Carrol@arentfox.com>
Subject: DEMAND TO BARGAIN AND REQUESTS FOR INFORMATION; United Food & Commercial Workers, Local 5; DFWS, Inc. dba The Guild San Jose; NLRB Case 32-RC-248845

Per Alan Crowley:

> Dear Ms. Anderson,
>
> On behalf of UFCW, Local 5, we are demanding that the Guild respond with dates to bargain a collective bargaining agreement on behalf of the employees represented by Local 5. Attached is a letter from Local 5 discussing the NLRB's recent certification of Local 5 as the bargaining unit's union representative, demanding the Guild cease any unilateral changes, demanding the Guild produce certain documents, and demanding dates for the parties to bargain a CBA.
>
> Please contact me or Jim Araby if you have any questions.
>
> Sincerely,
>
> Alan Crowley

Regards,

Sally Mendez, opeiu 29 afl-cio(1)
Legal Secretary
WEINBERG, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite 200

Alameda, CA 94501-1091
Phone: (510) 337-1001
Direct: (510) 337-7339
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Weinberg Roger & Rosenfeld
A Professional Corporation

1001 Marina Village Parkway, Suite 200
Alameda, California 94501
TELEPHONE: 510-337-1001
FACSIMILE: (510) 337-1023
Alan Crowley
acrowley@unioncounsel.net

April 2, 2020

VIA EMAIL

Dana Anderson
Operations Manager
DFWS Inc. d/b/a The Guild San Jose
2943 Daylight Way
San Jose, CA 95111
dana@receivershipspecialists.com

Re: DEMAND TO BARGAIN AND REQUESTS FOR INFORMATION
United Food & Commercial Workers, Local 5
DFWS, Inc. dba The Guild San Jose
NLRB Case 32-RC-248845

Dear Ms. Anderson:

Based on the Certification of Representation that Region 20 of the NLRB issued on March 31, 2020, UFCW Local 5 hereby demands that DFWS, Inc. dba The Guild San Jose ("Guild" or "Employer") commence bargaining with Local 5 over the wages, hours, terms and conditions of the Guild's employees. A copy of the Certification of Representation is attached. Local 5 is available to bargain immediately, thus please provide the Guild's dates of availability beginning with this week. The parties can discuss whether to bargain in person, with appropriate social distancing, or potentially by video or phone conference.

This letter is to remind you that under current Board law the Guild may not make unilateral changes after the date of the election won by UFCW Local 5. We want to put The Guild on notice that it should make no changes in wages, hours and working conditions without affording the Union an opportunity to bargain. Any such unilateral change is an unfair labor practice. We intend to impose the greatest risk upon your client if your client chooses that unreasonable course.

The following is a list of those changes which we insist not be made without bargaining over the decision and the effects. The list is not inclusive but is simply illustrative of all those changes.

1. No promotional position should be filled without bargaining.

2. No employee should have his/her hours changed without bargaining.

3. No employee should be warned, counseled, disciplined or terminated without bargaining.

4. No one should be hired without bargaining over the person who should fill the position.

5. No employee should be laid off without bargaining.
6. No health and welfare, pension or other fringe benefits should be denied without bargaining.
7. No positions outside the bargaining unit should be filled without bargaining over the question of transfer or promotion.
8. No work location, assignment, classification or any other aspect of employment should be changed without bargaining.
9. No discipline should be imposed without affording the employee the Weingarten rights which we hereby demand.
10. No changes in the method and manner by which work is being performed may be made without bargaining.
11. No introduction of any new work techniques without bargaining.
12. No subcontracting, closures, relocation or any changes in the workplace should be made without bargaining.
13. No jobs should be bid or commenced without bargaining.
14. No one should be terminated or suspended or disciplined without first notifying the union and affording the union a complete opportunity to bargain.

In considering this list the Guilds should consider the risk which you bear if your client chooses to make those changes without bargaining. If positions open in this unit or some other unit and the Guild does not bargain over the filling of those positions, we will argue that someone is entitled to back pay and the Guild may end up paying back pay for a lengthy period of time. If the Guild chooses to promote one individual and refuses to bargain over the person who should be promoted, we will take the position that someone else is entitled to the additional pay. If the Guild terminates or disciplines someone without bargaining over the decision and the effects of that termination (or other discipline), we will take the position that you should reinstate the person and/or owe back pay. If you lay off any individuals, we will take the position that you should have bargained over the decision as well as the effects and you will owe back pay over those layoffs. It should be apparent that the economic penalty for refusing to bargain with the Union forthwith may be severe.

Although we are reluctant to begin our relationship with these kinds of threats, it is sometimes necessary to make employers understand that there is a substantial economic penalty for delaying bargaining.

We, of course, demand that if there are any wage increases or benefit increases which would have normally occurred without the Union, those should be implemented in the normal course of business. We insist, however, being notified in advance of any such changes so that we can bargain over those changes. Included in the bargaining will most likely be a demand that the wage increases or other benefit changes be better than otherwise proposed. Nonetheless, Board law requires these changes be put into place and furthermore requires that you afford the Union a chance to bargain over those decisions as well as the effects of those decisions.

Pursuant to the Guilds legal obligation under the th NLRA, provide the following information to Local 5 for bargaining about the bargaining unit's terms and conditions:

1. A list of current employees including their names, dates of hire, rates of pay, job classification, last known address, phone number, date of completion of any probationary period, and Social Security number.
2. A copy of all current company personnel policies, practices or procedures.
3. A statement and description of all company personnel policies, practices or procedures other than those mentioned in Number 2 above.
4. A copy of all company fringe benefit plans including pension, profit sharing, severance, stock incentive, vacation, health and welfare, apprenticeship, training, legal services, child care or any other plans which relate to the employees.
5. Copies of all current job descriptions.
6. Copies of any company wage or salary plans.
7. Copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the last year. A copy of all witness statements for any such discipline.
8. A statement and description of all wage and salary plans which are not provided under number 6 above.
9. Any documents describing how the Guild is assisting workers during the coronavirus crisis, including any PPE provided to employees, staggering of breaks to maximize social distancing, additional cleaning supplies, sick leave, and any other benefits.

Please provide this information within the next ten days. Consider this letter to be a continuing demand. Provide responsive documents to Jim Araby and Ryan McGilley and copy the undersigned with any cover letter.

Sincerely,

Alan Crowley

cc: Mr. James Araby
Mr. Ryan McGilley
Mr. Robert Carrol

148464\1077383

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

DFWS INC. D/B/A THE GUILD SAN JOSE **Employer** **and** **UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 5** **Petitioner**	**Case 32-RC-248845**

TYPE OF ELECTION: STIPULATED

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Revised Tally of Ballots (Tally) shows that a collective-bargaining representative has been selected, and no objections have been filed regarding that Tally. The Employer timely filed objections to the election, but a hearing officer overruled the objections and the Employer did not file exceptions to that portion of the hearing officer's report. Rather, the Employer filed exceptions to the hearing officer's resolution of determinative challenged ballots. On January 16, 2020, I affirmed the hearing officer's findings and conclusions, directed that certain ballots be opened and counted, and informed the parties that the appropriate certification would issue as a result. The Employer filed and served the Region with its Request for Review of my Decision (Request) on January 31, one day after the due date and after the Tally issued, and its Request is pending before the Board.[1]

[1] The Regional Director's Decision Affirming the Hearing Officer's Findings and Recommendations and Order to Open and Count Determinative Challenged Ballots (Decision) issued on January 16, 2020 and appropriately set forth January 30, 2020 as the due date for the filing of a request for review. On the evening of January 30, the Employer attempted to e-file a request for review with the Executive Secretary's office (ES). However, the Employer did not serve the Region with a copy and did not submit the requisite Certificate of Service as required by Section 102.67(c)(2) of the Board's Rules until January 31. Accordingly, the ES did not accept the filing of the request for review until the Employer perfected its service and filing on January 31. Because my Decision resolving the determinative challenged ballots constituted "final disposition" under Sections 102.67(c) and 102.69(c)(2) of the Board's Rules, the Employer's tardy service and filing render its Request untimely in my view. Indeed, if parties were permitted to wait to file requests for review until after a revised tally of ballots issues (or after the accompanying certification), a Board reversal or remand could result in an impossible Humpty Dumpty scenario, with no way of piecing together the final result after certain determinative ballots were opened and counted. Irrespective of the timeliness of the Employer's request for review, Section 102.69(c)(3)(e) of the Board's Rules instructs regional directors to issue the appropriate certification when, as here, no objections are filed to the revised tally of ballots within seven days.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots has been cast for **United Food & Commercial Workers Union, Local 5** and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Unit: All full-time and regular part-time Front Desk, Inventory, Cultivation, Processing, Budtender, Distribution Manager, and Floor Manager employees; excluding the Operations Manager, Marketing Director, Store Manager, Assistant Store Manager, Confidential employees, Office Clerical employees, Guards, and Supervisors as defined in the National Labor Relations Act.

Dated: March 31, 2020

Jill H. Coffman

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JILL H. COFFMAN
Regional Director, Region 20
National Labor Relations Board

Attachment: Notice of Bargaining Obligation

NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,[1] an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

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[1] Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.